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No. 02-463

IN THE

Supreme Court of the United States

ALS SCAN, INCORPORATED,

Petitioner,

v.

DIGITAL SERVICE CONSULTANTS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Digital Service Consultants, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Factual Background

Petitioner ALS Scan, Inc. ("Petitioner") is a Maryland corporation that creates and sells pornographic photographs that are disseminated over the Internet. Pet. App. at 3.

Respondent Digital Service Consultants, Inc. ("Digital") is an Internet Service Provider ("ISP") that is incorporated under the laws of Georgia and maintains its only place of business in Georgia. Pet. App. at 22. Digital provides access to the Internet to its customers for maintaining websites and other activities over the Internet. Pet. App. at 22. Digital does this by renting portions of its available bandwidth to its customers, but has no input or control over how the bandwidth is used. Pet. App. at 4. Much like the telephone company in the context of oral communications, Digital plays a passive "conduit" role in facilitating the transmission of content over the Internet that is created by others. Digital does not own property, conduct business, or have any offices in the State of Maryland, and it does not derive any income from any clients or business in Maryland. Pet. App. at 4.

One of Digital's customers was Alternative Products, Inc. ("Alternative"). Alternative entered into a contract with Digital, in Georgia, for use of Digital's bandwidth to access the Internet. Alternative used this access to maintain two websites. Pet. App. at 3. Alternative's websites were apparently used by paid subscribers to view the content of the websites, which included adult pornographic photographs. Pet. App. at 3. Digital provided only bandwidth to Alternative (e.g., it provided a transmission function for Alternative's content). Pet. App. at 42. Digital did not

host Alternative's websites, store the content of the websites on its network, or store the content on its equipment. Pet. App. at 42. Digital had no knowledge of, or control over, the content of Alternative's websites. Pet. App. at 4. Petitioner contends that Alternative's websites published allegedly copyrighted materials belonging to Petitioner. Pet. App. at 3.[1]

Unrelated to the Alternative websites, Digital maintains its own generally accessible, informational website on the world wide web on which it describes its services. Pet. App. at 4. This general information website does not propose any Internet-based transactions. No one can buy Digital products or enter into a contractual relationship with Digital directly through its website.

B. Proceedings Below

On February 16, 2001, Petitioner filed suit against Digital and Alternative in the United States District Court for the District of Maryland alleging claims under 17 U.S.C. §§ 101, *et seq.*, commonly known as the Federal Copyright Act of 1976, as amended. More specifically, Petitioner's claims against Digital were brought under the Digital Millennium Copyright Act of 1998 ("DMCA").[2] Prior to filing an answer, Digital filed a motion to dismiss for lack of

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1. Ultimately, Digital terminated its relationship with Alternative and no longer provides Internet access to Alternative.

2. Petitioner's complaint sought monetary and injunctive relief against Digital. Since Digital is no longer providing Internet access to Alternative, Petitioner's request for injunctive relief against Digital is moot. The only possible claim for relief remaining against Digital is Petitioner's prayer for monetary damages.

personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). The District Court granted that motion and dismissed the complaint against Digital. The District Court held that it had neither specific nor general jurisdiction over Digital because Digital did not engage in any continuous or systematic contacts with Maryland and there was no evidence that Petitioner's claim arose out of any contacts that Digital may have had with Maryland. The District Court found that the only contact either Petitioner or Digital had with Maryland was that Petitioner (the plaintiff below) conducted its business there, which, standing alone, was legally insufficient for the exercise of personal jurisdiction in Maryland. Pet. App. at 34.

On June 14, 2001, Petitioner filed its Interlocutory Notice of Appeal. On June 19, 2001, the District Court certified its Order for immediate appeal to the United States Court of Appeals for the Fourth Circuit. On June 14, 2002, the Fourth Circuit affirmed the District Court's opinion. The Fourth Circuit found that Digital lacked sufficient contacts with Maryland to support the exercise of personal jurisdiction in Maryland under either Maryland's long-arm statute or the Due Process Clause. The court of appeals noted that although electronic signals from Digital's facility were received in Maryland, Digital's activities of providing bandwidth to Alternative and publishing its own website, which was unrelated to the infringement claim, were merely passive; Digital did not direct its electronic activity specifically at any target in Maryland and did not manifest an intent to engage in a business or some other interaction in Maryland.

On September 12, 2002, Petitioner filed a timely Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit seeking this Court's review.

REASONS FOR DENYING THE PETITION

This case does not present any clear or important question of law worthy of this Court's consideration on plenary review. Both the district court and a unanimous court of appeals held that, under the unique facts of this case, personal jurisdiction was lacking. That ruling is undoubtedly correct, and fully consistent with this Court's personal jurisdiction cases.

Under traditional due process analysis, Digital cannot be said to have purposefully availed itself of a Maryland forum for any purpose, nor could it expect to subject itself to Maryland jurisdiction by providing Internet transmission services to a Georgia entity in Georgia. Under well-established Due Process principles for evaluating the exercise of both specific and general personal jurisdiction, Digital's contacts with Maryland are insufficient to support the exercise of personal jurisdiction. While the Internet may be a relatively new technology, the Fourth Circuit faithfully applied this Court's minimum contacts precedents to the unique facts present here.

Petitioner's attempt to cast the Fourth Circuit decision as addressing a novel issue of law or as conflicting with the decisions of this Court or those of other circuits is unfounded. First, the ruling below relied extensively on the very precedents from this Court that Petitioner claims were ignored by the Fourth Circuit. Whether or not the framework of *Zippo v. Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) is applied to the facts of this case, the result is the same, personal jurisdiction is lacking as a matter of law. Second, there is no conflict among the circuits. Both the Tenth Circuit and the District of Columbia Circuit have cited *Zippo* with approval and there

is no indication that either court would decide the personal jurisdiction issue on the facts of this case any differently from the Fourth Circuit. The cases relied upon by Petitioner to allege a conflict are readily distinguishable and do not even support a conflict in legal approach let alone the kind of intolerable conflict justifying this Court's intervention.

Finally, the passage by Congress of the Digital Millennium Copyright Act of 1998 provides immunity from suit to most ISPs for copyright violations if the ISPs are mere passive conduits. In this case, Digital was a mere passive conduit. As a result, the facts at issue in this case will not arise very often. The statutory immunity will render questions of personal jurisdiction in the context of copyright actions for passive conduit activity moot. Therefore, a review of this case will not be helpful to the development of the law as Petitioner suggests because the case does not address an "important federal question."

Because the Court's intervention is clearly not called for at this time and because this case constitutes a poor vehicle for the announcement of any general principles of law in the area of personal jurisdiction, the petition for a writ of certiorari should be denied.

I.

THE FOURTH CIRCUIT CORRECTLY APPLIED THIS COURT'S MINIMUM CONTACTS JURISPRUDENCE TO THE UNIQUE FACTS OF THIS CASE

This case does not present any novel question of law for this Court to decide. Rather, on the unique facts of *this* case both the district court and a unanimous Fourth Circuit held

that personal jurisdiction was lacking. In so holding, the lower courts faithfully applied this Court's minimum contacts precedents to the undisputed facts in this case. Because the lower courts correctly concluded that Digital did not "purposefully avail" itself of the privilege of conducting business activities in Maryland, there is no justification for this Court's review.

A. The Personal Jurisdiction Standard Applied by the Fourth Circuit is Consistent with Due Process

The question of whether a court has personal jurisdiction over a defendant is founded in the Constitutional guarantee of Due Process. This Court has established a two-pronged test for determining whether the exercise of personal jurisdiction comports with Due Process. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The first prong requires that the defendant have certain "minimum contacts" with the forum. *Id.* at 317. The test for whether sufficient "minimum contacts" exist depends on whether the court seeks to exercise general or specific jurisdiction.[3] But both tests require the weighing of the specific facts before the court to determine the reasonableness of exercising jurisdiction. *Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978). The second prong, which has not been raised as an issue in this petition, is whether the exercise of jurisdiction

3. Petitioner's Question Presented does not specify whether it refers to general or specific jurisdiction. Pet. at i. The fact that the Question Presented is ambiguous makes it a poor candidate for this Court's review. The Fourth Circuit confronted the same uncertainty over which form of jurisdiction was being asserted by Petitioner and held that Digital's contacts with the forum were insufficient to exercise either general or specific jurisdiction over Digital. Pet. App. at 16-17.

comports with "fair play and substantial justice." *International Shoe*, 326 U.S. at 316. The fact-bound nature of the personal jurisdiction inquiry, standing alone, makes this an inappropriate case for this Court to review.

To trigger *specific* jurisdiction, a defendant's "minimum contacts" with the forum must satisfy three criteria. First, the contacts must be related to the plaintiff's cause of action or have given rise to it. *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985). Second, the contacts must involve an act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Third, the defendant's contacts with the forum must be such that the defendant should reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Personal jurisdiction is properly exercised where the defendant's contacts with the forum proximately result from actions by the defendant *itself* that create a substantial connection with the forum. *Burger King*, 471 U.S. at 475 (*quoting McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

General jurisdiction is necessary in a suit not arising out of or related to the defendant's contacts with the forum. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414, n.9 (1984). In general jurisdiction cases, the "minimum contacts" prong is met if the defendant has "continuous and systematic" contacts with the forum state. *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952) (permitting general jurisdiction where defendant's contacts with the forum were "continuous and systematic"). "[T]he threshold minimum contacts required to confer

general jurisdiction is a significantly higher standard than for specific jurisdiction." *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 623 (4th Cir. 1997).

This Court has previously addressed the effect of technological advances on personal jurisdiction. In *Hanson v. Denckla*, this Court held that while advances in communications and transportation have made it less burdensome for nonresidents to defend suits in foreign forums, this trend does not extinguish all restrictions on personal jurisdiction because it does not affect the Due Process considerations related to a court's assertion of power over defendants. 357 U.S. at 250-51. The minimum contacts analysis, as it relates to the court's power over defendants is, therefore, largely unaffected by changes in technology.

B. The Fourth Circuit's Opinion Does Not Conflict With Any Decision of this Court

Despite Petitioner's contention, there is no conflict between the Fourth Circuit's opinion and this Court's personal jurisdiction jurisprudence. This Court has historically declined to find that a conflict exists unless there is a "real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." *Robert L. Stern, et al., Supreme Court Practice* 167 (7th ed. 1993). There is no "real or 'intolerable'" conflict between the decision of the Fourth Circuit and prior decisions of this Court.

A review of the Fourth Circuit's decision reveals that the court set forth the standard for personal jurisdiction articulated by this Court, and then applied it to the unique facts of this case. The Fourth Circuit began its analysis by

noting that this Court held in *Hanson v. Denkla* that changes in technology making interstate travel and commerce faster and easier do not eliminate all restrictions on the exercise of personal jurisdiction by courts. Pet. App. at 8-9. Based on *Hanson*, the Fourth Circuit rejected the notion that simple electronic transmissions into a state alone are sufficient minimum contacts for purposes of personal jurisdiction. Pet. App. at 8. To hold otherwise, as Petitioner submits, would eviscerate the requirement of minimum contacts whenever any modern means of electronic communication (*e.g.*, telephone, Internet) is used by a defendant for any purpose.

In analyzing the facts of this case, the Fourth Circuit adopted and adapted a model developed in *Zippo* for determining when sufficient minimum contacts exist in the Internet context. Pet. App. at 14. The *Zippo* model can be described as a sliding scale based on the extent to which a defendant's electronic contacts interact with the forum. The Fourth Circuit analogized the model developed in *Zippo* to a similar application of the personal jurisdiction test made by this Court in *Calder v. Jones*, 465 U.S. 783 (1984). Pet. App. at 15.[4]

After adopting and adapting the *Zippo* model, the Fourth Circuit set forth a three-part test, which is entirely consistent

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4. *Calder* involved defendants who wrote and edited a libelous story in Florida for a publication circulated in California about a California resident. 465 U.S. 783. This Court held in *Calder* that personal jurisdiction over the defendants was proper because the defendants directed their tortious conduct at the plaintiff in California and the defendants knew at the time the tort was committed that the injury would be felt by the plaintiff in the forum. *Id.* The key fact in *Calder*, which is lacking here, is the conscious direction of activity by the defendant toward the forum at issue.

with *Calder* and this Court's other minimum contacts precedents. Pet. App. at 14. The test states that a court may exercise judicial power over a person outside of the State when that person "(1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts." Pet. App. at 14. This test follows the inquiry made by this Court in *Calder* because it asks whether the defendant purposefully directed its conduct toward the forum state. As such, the Fourth Circuit did not adopt a "new test" for minimum contacts—it merely adapted well-established concepts from this Court's minimum contacts jurisprudence to the Internet context.

On the particular facts of this case, the Fourth Circuit held that because Digital's conduct relative to its electronic contacts with Maryland was passive, it did not purposefully direct its activity toward the forum. Pet. App. at 15. Digital had no control over Alternative's content and did not direct that content to any particular forum. The finding of a lack of specific personal jurisdiction in this context is fully consistent with (and indeed dictated by) this Court's minimum contacts precedents. The Fourth Circuit would have been obligated to reach the same result regardless of its reference to the *Zippo* model, for this Court's decisions such as those in *Calder* and *Burger King* draw the same distinction between passive and active contacts outside the Internet setting.

II.

THE *ZIPPO* TEST ADOPTED AND ADAPTED BY THE FOURTH CIRCUIT IS NOT A NEW TEST FOR PERSONAL JURISDICTION

The *Zippo* court did not set forth a "new test" for exercising personal jurisdiction over a defendant as alleged by Petitioner. Petitioner attempts to portray the *Zippo* court as a renegade court that ignored this Court's precedents. The *Zippo* court, however, simply applied this Court's precedents to a modern fact pattern. *Zippo* was a trademark infringement case involving a defendant online news service that conducted much of its business over the Internet. 952 F. Supp. 1119. The *Zippo* court, therefore, addressed the propriety of personal jurisdiction when a defendant's contacts with the forum are electronic contacts rather than physical ones. Those facts were analyzed under the traditional concept that "when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper." *Zippo*, 952 F. Supp. at 1124 (*citing Burger King*, 471 U.S. at 475). The result was a model suggesting that when a defendant uses a website on the Internet to conduct its business, it is how the website is used that determines the relevant contacts with the forum. *See Zippo*, 952 F. Supp. at 1124. In other words, if the website interacts with persons in the forum state (such as offering to complete a transaction through the Internet contact), those contacts may be enough to show that the defendant purposefully availed itself of the forum. In essence, they are no different than a "bricks and mortar" retail presence. But when the Internet activity is entirely passive, such as merely providing transmission of other's content without control over form or destination, or

running an "informational website" that does not itself offer to transact any business, this is not enough contact for personal jurisdiction. *See id.*

The principles recognized in *Zippo* are fully consistent with this Court's requirements of "purposeful availment" and the notion that the defendant should be aware its contacts could lead to personal jurisdiction. These tests are not met in the case of purely passive Internet activity or presence. Thousands of interstate and international businesses maintain informational websites that can be accessed in every State and territory in the Union (and, in fact, all over the world). Where those websites are not used to transact business, their owners have not subjected themselves to nationwide personal jurisdiction.

The Fourth Circuit's holding here is also consistent with this Court's holding that personal jurisdiction cannot be based on the unilateral activity of another party but, rather, it must be based on the intentional activity of the defendant. *See Hanson*, 357 U.S. at 253. In this case, it is Alternative that transacted business through its website in various states—Digital's transmission services did not offer a transaction to anyone. Therefore, the *Zippo* court did not announce a new test under Due Process for personal jurisdiction; it merely applied a modern factual scenario to existing Supreme Court jurisprudence.

III.

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE JURISDICTIONAL ISSUE PRESENTED BY THIS CASE

Petitioner argues that this Court should review the Fourth Circuit's opinion because there is a conflict between the circuit courts of appeals as to the application of the *Zippo* model. Pet. at 24. However, no circuit court of appeals' decisions are in conflict with the Fourth Circuit's decision. As stated above, this Court historically declines to find that a conflict exists unless there is a "real or 'intolerable' conflict on the same matter of law or fact." *Stern*, *supra* at 167. Petitioner attempts to raise the specter of a conflict by stating that the Tenth and District of Columbia Circuits apply the traditional personal jurisdiction analysis while the Fourth Circuit chose to apply a "new test." Pet. at 24. Petitioner's argument fails because the Tenth Circuit and the District of Columbia Circuit have both cited *Zippo* with approval and followed its reasoning, including in the Tenth Circuit case cited by Petitioner.

A. The Tenth Circuit Approves of the *Zippo* Model.

The Tenth Circuit case Petitioner cites in support of its argument that a conflict exists among the courts of appeals actually approves of the result reached in *Zippo*. *See Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*, 205 F.3d 1244 (10th Cir. 2000). It is, therefore, difficult to understand Petitioner's proffer that the Tenth Circuit in *Intercon* chose to apply the traditional due process analysis in an Internet tort action while *Zippo*, and thus, the Fourth Circuit, did not. In holding that the defendant's contacts with the forum were

substantial enough to make the exercise of jurisdiction reasonable, the Tenth Circuit cited *Zippo* as an "analogous situation." *See Intercon*, 205 F.3d at 1248. *Intercon* involved a tort claim against a defendant who accessed the plaintiff's server without permission. The *Intercon* court held that because the electronic contacts were directed at the forum and actually affected the plaintiff's property in the forum, such contacts were sufficient minimum contacts for personal jurisdiction purposes. *Id.* While the court did not expressly address or adopt the *Zippo* sliding scale model, it applied the same analysis as the Fourth Circuit and the *Zippo* court in addressing minimum contacts in an Internet case. *Id.* It noted the distinction made in *Zippo* between passive website cases and those cases where defendants actually enter into contracts with residents of the forum that involve the repeated transmission of information over the Internet. *Id. Intercon* thus represents the application of the same principles applied by the Fourth Circuit to a different set of facts with a different result—not a conflict that suggests the Tenth Circuit would come to a different result under the facts of this case.

Further proof of the Tenth Circuit's approval of the Zippo analysis is found in *Soma Medical Int'l v. Standard Chartered Bank*, 196 F.3d 1292 (10th Cir. 1999). In that case, the Tenth Circuit adopted the *Zippo* sliding scale reasoning in deciding that it did not have general jurisdiction over the defendant. *Soma* involved a suit by an account holder of the defendant bank for breach of contract and negligence after the bank allegedly disbursed funds based upon an unauthorized signature. The *Soma* court held, inter alia, that the defendant's maintenance of an informational website on the world wide web that is accessible from the forum state did not create the kind of minimum contacts sufficient for exercising general

personal jurisdiction. In so holding, the *Soma* court quoted a District Court of Utah case that adopted *Zippo*'s model. Therefore, Petitioner's argument that a conflict exists between the Tenth Circuit and the Fourth Circuit is unfounded.

B. The District of Columbia Circuit Approves of the *Zippo* Analysis.

The District of Columbia Circuit also approves of the analysis used in Zippo and adopted by the Fourth Circuit. The case cited by Petitioner as conflicting with the Fourth Circuit is *GTE New Media Services, Inc. v. BellSouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000). Any purported rejection of the *Zippo* standard in this opinion, however, is dicta because the court remanded the matter back to the district court so that the plaintiff could conduct discovery on the issue of personal jurisdiction. *See GTE*, 199 F.3d at 1352. Also, despite Petitioner's contention that the District of Columbia Circuit "specifically rejects *Zippo*" in *GTE*, a fair reading of the opinion illustrates that it agrees with the *Zippo* model.

In *GTE*, the District of Columbia Circuit rejected GTE's argument that accessability of the defendant's website in the forum establishes minimum contacts because, under that view, the use of a website would subject its owner to jurisdiction in every court in the country. 199 F.3d at 1350. In other words, the court described a "passive" website under the *Zippo* model and agreed that such activities are not sufficient for personal jurisdiction. *Id.* The court also stated that personal jurisdiction cannot be based solely on the "ability of District residents to access the defendants' websites, for this does not by itself show any persistent course

of conduct by the defendants in the District." *GTE*, 199 F.3d at 1349. This is exactly the holding in *Zippo* and of the Fourth Circuit in this case.

In a case decided this summer, the District of Columbia Circuit also quoted the *Zippo* court's definition of the type of Internet activity at the end of the sliding scale where personal jurisdiction exists. *See Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 513 (D.C. Cir. 2002). The *Gorman* court went on to say that an examination of the frequency and volume of the defendant's transactions with the District of Columbia would determine whether it is actually "doing business" in the forum. *Id.* This inquiry by the District of Columbia Circuit asks where on the *Zippo* sliding scale the defendant's contacts reside, demonstrating its approval of *Zippo*. This is the same inquiry employed by the Fourth Circuit in this case. Therefore, despite Petitioner's assertions, there exists no conflict between the circuits on the issue presented in this case.

The lack of any real conflict between circuits is evidence that percolation of how minimum contacts should be considered in the context of the Internet has not occurred. *See Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting) ("when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.") Until there is a real conflict among the circuits on this issue, this Court should decline to consider it.

IV.

THIS CASE DOES NOT RAISE ANY IMPORTANT ISSUES OF FEDERAL LAW WORTHY OF THIS COURT'S REVIEW

In addition, the Court should deny this petition because it does not present an important issue of federal law that is likely to recur. In most cases where an ISP acts as a passive conduit for the content of its customers, section 512 of the DMCA will provide immunity from suit for copyright violations. The DMCA was enacted to, *inter alia*, "provide immunity to [Internet] service providers from copyright infringement liability for 'passive,' 'automatic' actions in which a service provider's system engages through a technological process initiated by another without the knowledge of the service provider." *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4th Cir. 2001).

The DMCA, therefore, protects ISPs who meet certain safe harbor requirements from liability for all monetary relief for direct, vicarious *and* contributory infringement. *See Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001). In this case, Digital was a passive conduit and is protected from liability by the DMCA. Therefore, since cases factually similar to the one presented in this Petition will be rare in the future, Petitioner's Question Presented does not present an "important federal question" that is worthy of this Court's limited resources on plenary review.

CONCLUSION

For all of the foregoing reasons, Digital respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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